54 (3)

No. 06-1140

In The Supreme Court of the United States

BONNIE WITTENBURG,

Petitioner,

v.

AMERICAN EXPRESS FINANCIAL ADVISORS, INC.,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF IN OPPOSITION

Julie Fleming-Wolfe
Counsel of Record
ATTORNEY AT LAW
1922 Grand Avenue
St. Paul, Minnesota 55105
(651) 767-8642

Counsel for Respondent

John M. Baker
Pamela L. VanderWiel
GREENE ESPEL, P.L.L.P.
200 S. Sixth Street, Suite 1200
Minneapolis, Minnesota 55402
(612) 373-0830

Counsel for Respondent

THE LEX GROUP^{DC} ♦ 1750 K Street N.W. ♦ Suite 475 ♦ Washington, DC 20006
(202) 955-0001 ♦ (800) 815-3791 ♦ Fax: (202) 955-0022 ♦ www.thelexgroupdc.com

QUESTIONS PRESENTED

1. Whether review is necessary to reverse application of a standard by which an employment discrimination plaintiff must prove pretext by a preponderance of the evidence to withstand summary judgment, when that was not the standard applied in this case or by the Eighth Circuit in other cases?

2. Whether review is necessary to determine whether a discrimination plaintiff must show some causal connection between "stray remarks" and adverse action in order for those statements to constitute a submissible case of discrimination, when there is no genuine split among the circuits on this issue.

3. Whether review is necessary in this case to reverse the Court of Appeals decision that summary judgment on Petitioner's age and gender discrimination claims was appropriate, when Petitioner failed to present evidence to support a reasonable inference of pretext and such a ruling is consistent with this Court's directives on consideration of summary judgment?

4. Whether review is necessary to reverse application of a bright line rule that a six-year age difference between a plaintiff and a person to whom her duties are distributed after a reduction-in-force does not create an inference of discrimination, when no such bright line rule was applied in this case?

CORPORATE DISCLOSURE STATEMENT

Respondent American Express Financial Advisors, Inc. and its parent company, American Express, hereby submit this corporate disclosure statement, pursuant to 8th Cir. R. 26.1A: (1) As of September 30, 2005 American Express Company spun off Ameriprise Financial, Inc. (formerly known as American Express Financial Corporation), into an independent company. Ameriprise Financial, Inc. has no parent company as of that date; and (2) Berkshire Hathaway owns more than 10% of Ameriprise Financial, Inc. on the date of the spin-off.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

CORPORATE DISCLOSURE STATEMENT ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES v

STATEMENT OF THE CASE 1

REASONS FOR DENYING THE PETITION 9

I. THE PETITION IS BASED ON THE INCORRECT ASSERTION THAT THE COURT OF APPEALS APPLIED A "PREPONDERANCE OF THE EVIDENCE" STANDARD FOR EVALUATION OF PETITIONER'S PRETEXT CASE 9

II. THERE IS NO GENUINE CONFLICT IN THE COURTS OF APPEALS ON THE ISSUE OF WHEN STRAY REMARKS CONSTITUTE EVIDENCE OF DISCRIMINATION 13

III. THE STANDARD USED BY THE COURT OF APPEALS IN EVALUATING PETITIONER'S EVIDENCE ON SUMMARY JUDGMENT IS NOT IN CONFLICT WITH THIS COURT OR WITH OTHER COURTS OF APPEALS 22

IV. THE PETITION IS BASED ON THE INCORRECT ASSERTION THAT THE COURT OF APPEALS HELD THAT AS A MATTER OF LAW THERE COULD BE NO INFERENCE OF AGE DISCRIMINATION BASED ON A SIX-YEAR AGE DIFFERENCE BETWEEN A TERMINATED PLAINTIFF AND A PERSON IN THE PROTECTED CLASS WHO ASSUMED HER DUTIES 26

CONCLUSION 29

TABLE OF AUTHORITIES

Page(s)

Federal Cases

Abrams v. Lightolier, Inc.,
50 F.3d 1204 (3d Cir. 1995).....19

Anderson v. Liberty Lobby, Inc.,
477 U.S. 242 (1986).....12

Celotex Corp. v. Catrett,
477 U.S. 317 (1986).....12, 13

Cerutti v. BASF Corporation,
349 F.3d 1055 (7th Cir. 2003).....17

Crone v. United Parcel Service, Inc.,
301 F.3d 942 (8th Cir. 2002).....11

Dunsmuir v. May Department Stores Co.,
120 Fed. Appx. 927 (3d Cir. 2005).....19

Equal Employment Opportunity Commission v. Alton Packaging Corp.,
901 F.2d 920 (11th Cir. 1990).....18

Erickson v. Farmland Industries, Inc.,
271 F.3d 718 (8th Cir. 2001).....11

Fetterman v. Napco, Inc.,
2005 WL 1652212 (3d Cir. Jul. 14, 2005).....19

Forrest v. Kraft Foods, Inc.,
285 F.3d 688 (8th Cir. 2002) 11

Foster v. Newcastle Area Sch. Dist.,
2004 WL 830878, (3d Cir. April 16, 2004)19-20

Frieze v. Boatmen's Bank of Belton,
950 F.2d 538 (8th Cir. 1991) 16

Grosjean v. First Energy Corp.,
349 F.3d 332 (6th Cir. 2003) 27, 28

Hitt v. Harsco Corp.,
356 F.3d 920 (8th Cir. 2004) 10, 19

Hutson v. McDonnell Douglas Corp.,
63 F.3d 771 (8th Cir. 1995) 15, 16

Johnson v. AT&T Corp.,
422 F.3d 756 (8th Cir. 2005) 10, 11

Kohrt v. MidAmerican Energy Co.,
364 F.3d 894 (8th Cir. 2004) 9, 10

Matsushita Electrical Industrial Co. v. Zenith Radio Corp.,
475 U.S. 574 (1986) 12

McDonnell Douglas Corp. v. Green,
411 U.S. 792 (1973) 13

O'Connor v. Consol. Coin Caterers Corp.,
517 U.S. 308 (1996) 26, 27

Pivirotto v. Innovative Sys., Inc.,
191 F.3d 344 (3d Cir. 1999).....17

Reeves v. Sanderson Plumbing Prod. Inc.,
530 U.S. 133 (2000).....10, 14

Rojas v. Florida,
285 F.3d 1339 (11th Cir. 2002).....18

Rothmeier v. Investment Advisers, Inc.,
85 F.3d 1328 (8th Cir. 1996).....11

Rowan v. Lockheed Martin Energy Systems, Inc.,
360 F.3d 544 (6th Cir. 2004).....19

Ryder v. Westinghouse Elec. Corp.,
128 F.3d 128 (3d Cir. 1997),
cert. denied, 522 U.S. 1116 (1998).....16

Ryther v. KARE 11,
108 F.3d 832 (8th Cir.) (en banc),
cert. denied, 521 U.S. 1119 (1997).....11

Schiltz v. Burlington N.R.R.,
115 F.3d 1407 (8th Cir. 1997).....27

Scott v. Suncoast Beverage Sales,
295 F.3d 1223 (11th Cir. 2002).....18

Scroggins v. Univ. of Minn.,
221 F.3d 1042 (8th Cir. 2000).....12

Shefferly v. Alliance Health Plan of Mich.,
2004 U.S. App. LEXIS 6829
(6th Cir. April 5, 2004) 18

Taylor v. QHG of Springdale, Inc.,
218 F.3d 898 (8th Cir. 2000) 12

Tooson v. Roadway Express, Inc.,
47 Fed. Appx. 370 (6th Cir. 2002).....17

Walden v. Georgia-Pacific Corp.,
126 F.3d 506 (3d Cir. 1997).....16

Windfelder v. The May Dep't Stores Co.,
2004 WL 362292
(3d Cir. February 26, 2004) 17, 19

Wisniewski v. U.S.,
353 U.S. 901 (1957).....20

Wittenburg v. American Express
Financial Advisors, Inc.,
464 F.3d 831 (8th Cir. 2006) .....*passim*

STATUTES

29 U.S.C. §§ 621-634 (2000) 8

42 U.S.C. §§ 2000e-2000e-17 (2000).....8

Minn. Stat. §§ 363A.01-.41 (2004).....8

RULES

Fed. R. Civ. P. 1.....13

S. Ct. R. 10.....22

STATEMENT OF THE CASE

Petitioner Bonnie Wittenburg seeks review of a summary judgment decision by the district court, affirmed by the Eighth Circuit Court of Appeals, on Petitioner's claims of age and gender discrimination in connection with her termination as part of a reduction-in-force in November 2003.

Petitioner was hired by American Express Financial Advisors, Inc. (AEFA) in November 1998 when she was 46 years old, to work as an equity research analyst in AEFA's Equity Investment Department (EID). Petitioner was assigned to cover technology sector stocks, to do research and make a "buy, hold or sell" recommendation to AEFA Portfolio Managers.

In September 2001, Ted Truscott, 40, was hired as AEFA's Chief Investment Officer and became responsible for all investment activity at AEFA internationally. He directly supervised the senior EID Portfolio Managers, who supervised the analysts. In November 2001, Thomas Mahowald, 37, was hired as Director of Equity Research. Petitioner then reported to Mahowald, who reported to Truscott.

At the time that Truscott joined AEFA, the Company was facing declining investment results and an economic downturn compounded by the events of September 11, 2001. Truscott was charged with developing and implementing a world class asset management organization. At that time, the majority of AEFA's mutual funds were located and

managed in Minneapolis, with satellite offices in San Diego and New Jersey that were managed by Portfolio Managers. Research for the satellite offices was provided by Minneapolis analysts, including Petitioner. (Appendix of Appellee on Appeal to Eighth Circuit, pp. 558,565, 569, hereinafter "App. __")

In February 2002 Truscott began work on a redesign of the EID, with support from a large cross-functional team of AEFA employees. (App. 565-569, 584-585) As part of the redesign, Truscott decided to create another satellite office in Boston and to merge or move funds to the satellite offices in San Diego, Boston and New Jersey. (App. 565) The reorganization contemplated less use of Minneapolis research analysts to support the offices in Boston, San Diego, and New Jersey, and the addition of analysts in Boston and San Diego. (App. 559-561, 690) Consequently, there was a need to eliminate research analyst positions in Minneapolis through a reduction-in-force ("RIF"). (App. 565, 567, 589)

A February 2002 RIF related to the transfer of portfolios to the Boston office and involved only Portfolio Managers. In June 2002, there was another RIF in connection with the redesign which included three analyst positions but primarily impacted Portfolio Managers. AEFA's Human Resources Department conducted the 2002 RIFs using AEFA's standard multiple incumbent process, which included: 1) obtaining the business rationale from the business leaders; 2) obtaining organization charts; and 3) conducting the multiple incumbent ranking by comparing employees performing the

same function and ranking them according to a standard set of criteria, i.e., the previous year's performance rating, and if there was a tie, the next previous year's performance rating, and if still tied, tenure. (App. 583, 595, 648-651, 654-655, 659, 690-691) In the June 2002 RIF, out of a multiple incumbent pool of 24 analysts, 15 were 40 years old or older and three were women. Of the three analysts selected for job elimination, two were over 40 years old and none were women. (App. 684-688, 698-699) After the June 2002 RIF, Mahowald sent an email to the EID stating, "[t]here is no second shoe to drop," because he did not anticipate any further job eliminations as a result of the redesign. (App. 605, 608-609, 665, 667)

At the end of each year, all employees' performance was reviewed and rated for goal achievement (the "G" rating) and leadership competencies (the "L" rating), with 1 being the highest rating and 5 being the lowest. The year-end performance evaluation process for analysts was structured and consistent from year to year. The process began in September with the entry of performance data for each analyst into the Company's human resources system. That data included analysts' self-appraisals, which were submitted to Mahowald for his review and comments, and a preliminary performance rating determined by Mahowald based on the comments of Portfolio Managers, his own comments, and the information available to him at the time with respect to analysts' recommendations versus the "S&P 500" and the investment "universe." (App. 603) The performance data used to determine each analyst's

component G score was aggregated and reviewed at the year-end ratings alignment meeting, also known as the consistent ratings meeting, which occurred in December. (App. 629) The purpose of the ratings alignment meeting was to ensure that different leaders within the department were looking consistently at the performance of people in similar jobs. (App. 562-564, 579, 630-631, 633) Mahowald made a rating recommendation for each analyst. However, the ratings would sometimes change after the alignment meeting based on input from those attending. (App. 576, 580-581)

In late 2002, the EID held its ratings alignment meeting and Petitioner's 2002 performance rating, along with that of all other analysts, was reviewed by Truscott, Mahowald, Forker, Human Resources Relationship Leader Sherry Johnson, and Portfolio Managers Warren Spitz, Gordon Fines, Dan Rivera, John Schonberg and Jim Johnson. (App. 632, 636) Mahowald's proposed ratings were discussed by the group and were subject to change based on the group's discussion. (App. 616) In 2002 Mahowald's proposed rating for analyst David Benz, age 35, was G1/L3, but after the rating alignment meeting, Benz was rated G2/L3 for 2002. (App. 705) Similarly, for 2002, Mahowald's proposed rating for Petitioner was G3/L3, but as a result of the ratings alignment meeting, Petitioner's 2002 rating was lowered to G4/L3. Petitioner's performance, as with all analysts, was based primarily on an objective assessment of the performance of her stock picks and the funds on which she worked. (App. 601-603) Petitioner's low rating in 2002 was largely the result

of poor performance of the funds on which she worked and some correspondingly negative input from the Portfolio Managers she had worked with that year. (App. 576, 603-604) Although Petitioner, unlike some analysts, completed the assignment given by Mahowald to pick up unrated stocks in the fourth quarter of 2002, her ratings on those stocks did not help the Portfolio Managers make money and therefore was not a positive consideration in her rating. (App. 742) The other Technology Sector analysts' ratings in 2002 were: David Friedrichsen (age 39) G3/L3, Kurt Lauber (age 35) G3/L1, and Dean Ramos (age 39) G3/L1. (App. 707)

None of the analysts, including Petitioner, received written performance evaluations in 2002 because Mahowald did not have time to complete the portion of the written reviews relating to analyst stock picks. However, Mahowald met separately with each of the analysts including Petitioner, in February 2003, to deliver his 2002 year-end performance review verbally. Petitioner complained to Mahowald during this meeting that her 2002 rating was too low, but Mahowald disagreed. (App. 522, 554, 615) Again in June 2003, Petitioner complained about her 2002 rating to Mahowald. At that time, she asserted that her G4 rating was too low based on "Starmine" data for 2002. Starmine was an information system AEFA reviewed and considered using in 2003, but which was never used by AEFA in evaluation of analysts' performance. (App. 623) Mahowald agreed with Petitioner about what the "Starmine" data showed, but he disagreed that the data should have impacted her performance rating, since Starmine data was not used by AEFA

for evaluating any analyst's performance. (App. 554-555) In September 2003, Petitioner again raised the issue of her 2002 G4 rating because she heard that three analysts in Boston had been terminated for performance reasons, and because she wanted Mahowald to bias her 2003 rating so that she received a higher bonus for 2003. Mahowald reassured her that she was not on probation because of the G4 and that she should not worry about her rating because she was having a good year for 2003. (App. 554-555)

In the summer of 2003, AEFA decided to merge certain existing mutual funds into other funds and to transfer fund management of certain funds to other satellite offices. To implement this decision, Truscott decided to restructure the Minneapolis office to conform to the Portfolio Manager driven model in place in other satellite offices – a model that included having the Portfolio Manager hire and supervise the research analysts that supported the funds they managed. It was determined that the Minneapolis office would eliminate analysts by sector, so that the office would have the kind of sector coverage best needed to support the remaining Portfolio Managers in Minneapolis. (App. 565, 567, 570, 583, 589, 690-691)

In September 2003, Truscott informed Mahowald that there would be another RIF of analysts later in 2003. In October 2003, Mahowald, Forker, Chief Administrative Officer Peter Gallus, Sherry Johnson, Schonberg, Spitz, and Bales had meetings to determine how many analysts would be needed to cover each of the sectors of mutual fund

products located in Minneapolis. (App. 570-571, 591-592, 607-608) They determined that only one Technology Sector analyst was needed. At the time this business plan was implemented, Petitioner was one of four Technology Sector analysts. The business decision was made to retain only one of four Technology Sector analysts.

AEFA used its standard multiple incumbent process to determine which of the four Technology Sector analysts would be terminated. (App. 648-651, 654-655) Consistent with that process, the performance ratings of analysts for 2002 and, in the event of a tie, 2001, were used in determining which analysts within each sector would be terminated. Like all the other analysts, Petitioner's 2002 (G4/L3) and 2001 (G3/L3) ratings were used. (App. 587-588, 595-596, 690-691, 734-735; 738-740) The multiple incumbent process was applied to analysts by "sector" e.g., financial, consumer, industrial, health care and technology. (App. 589, 591-592, 596) Of the seventeen analysts, eleven were 40 years old or older and two were women. The two women analysts were Petitioner (age 51), and Sandy Hollenhorst (age 51), who had been hired by Mahowald in 2001. (App. 600) Of the seven analysts selected for job elimination based on application of the multiple incumbent process criteria, four were 40 years old or older and one (Petitioner) was a woman. (App. 684-691, 696-698) Of the four Technology Sector analysts who were considered for position elimination, Friedrichsen (age 41), Lauber (age 36), Ramos (age 40), and Petitioner (age 51), only Ramos was retained. (App. 684-691, 698-699)

Petitioner was notified of her position elimination on November 18, 2003 in a meeting with Truscott and Forker. Petitioner asked why she had been selected for position elimination and Truscott told her that the decision was made based on AEFA's desire to keep only one technology analyst and her low 2002 rating (App. 547-548, 554-555)

After the November 2003 RIF was announced, analysts Steve Roorda (age 45) and Larry Alberts (age 49), who covered the industrial sector, began to assist Ramos in covering the technology sector. (App. 525)

After she was laid off, Petitioner brought an action against AEFA asserting claims of age discrimination under the Age Discrimination in Employment Act (ADEA), 29 U.S.C. §§ 621-634 (2000), gender discrimination and retaliation under Title VII of the Civil Rights Act (Title VII), 42 U.S.C. §§ 2000e-2000e-17 (2000), and gender and age discrimination and retaliation under the Minnesota Human Rights Act, (MHRA), Minn. Stat. §§ 363A.01-.41 (2004). AEFA moved for summary judgment on all claims. The District Court applied this Court's and Eighth Circuit precedent in evaluating the motion, and granted summary judgment on all of Petitioner's claims and she appealed. The Eighth Circuit Court of Appeals faithfully applied the precedent of this Court and determined that Petitioner failed to present evidence from which a reasonable jury could find pretext, and affirmed summary judgment. This petition followed.

REASONS FOR DENYING THE PETITION

I. THE PETITION IS BASED ON THE INCORRECT ASSERTION THAT THE COURT OF APPEALS APPLIED A "PREPONDERANCE OF THE EVIDENCE" STANDARD FOR EVALUATION OF PETITIONER'S PRETEXT CASE.

Petitioner rests her request for review primarily on the assertion that the Eighth Circuit demanded that she prove pretext by a preponderance of the evidence in order to survive summary judgment. However, the Court of Appeals did not embrace or impose a preponderance of the evidence standard in this case. Instead, the Court of Appeals reviewed the case under a standard that was wholly consistent with the holdings of this Court.

Petitioner relies on *Kohrt v. MidAmerican Energy Co.*, 364 F.3d 894, 897-98 (8th Cir. 2004), for her argument that the Eighth Circuit requires a plaintiff to prove pretext by a preponderance of the evidence to survive summary judgment. This case, of course, is not *Kohrt*. The Court of Appeals decision did not cite *Kohrt*. Moreover, while the *Kohrt* Court misstated the evidentiary standard on summary judgment, it did not *apply* the wrong standard.

Petitioner focuses exclusively one sentence in *Kohrt* that is surrounded on all sides by correct references to reasonable inferences, but that inexplicably failed to repeat that concept. In that

sentence, the Court misstated the plaintiff's burden by stating that "[s]tated in simpler terms, in order to survive summary judgment, Kohrt "must 'prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination.'" *Id.*, *citing Hitt v. Harsco Corp.*, 356 F.3d 920, 924 (8th Cir. 2004) (*quoting Reeves v. Sanderson Plumbing Prod. Inc.*, 530 U.S. 133, 143 (2000)). But any impression that the *Kohrt* court actually *required* proof by a preponderance of the evidence at the summary judgment stage is dispelled two paragraphs later, when the court began its analysis of the summary judgment record. There, the Eighth Circuit stated that "[t]he district court held that Kohrt's ADEA claim did not survive summary judgment 'because the evidence [he presented did] not *create a reasonable inference* that age was a determinative factor in the decision not to rehire him.'[citation omitted] *We agree.*" *Kohrt* at 898 (emphasis added). When *Kohrt* is viewed as a whole, it becomes readily apparent that the Eighth Circuit applied a reasonable inference standard, and that the sentence Petitioner relies upon was simply an unintended misstatement.

This conclusion is supported by the fact that the only Eighth Circuit decision to cite *Kohrt* for the summary judgment standard did not cite the preponderance of evidence language and instead reiterated the "reasonable inference" standard for evaluating a plaintiff's burden of establishing pretext to avoid summary judgment. In *Johnson v. AT&T Corp.*, 422 F.3d 756 (8th Cir. 2005), the Court of Appeals relied on *Kohrt* in describing the showing

of pretext necessary to withstand summary judgment as "more than merely discrediting an employer's asserted reasoning" for adverse action; rather the plaintiff must "show that the circumstances permit a reasonable inference to be drawn that the real reason" was discrimination. *Id.* at 763. This is the standard routinely applied by the Eighth Circuit when reviewing summary judgment in discrimination cases, and is consistent with the holdings of this Court and that of the other Courts of Appeals. *See Crone v. United Parcel Service, Inc.*, 301 F.3d 942, 944 (8th Cir. 2002) ("Thus, the summary judgment issue in this case turns, as it often does in employment discrimination cases, on whether Ms. Crone presented evidence raising a reasonable inference that UPS's legitimate non-discriminatory reason was in fact a pretext for intentional sex discrimination;" "[plaintiff] failed to raise a submissible jury issue of pretext."), *citing Ryther v. KARE 11*, 108 F.3d 832, 848 & n. 13 (8th Cir. 1997) (en banc), *cert. denied*, 521 U.S. 1119 (1997) (this summary judgment standard is the same as for judgment as a matter of law); *Forrest v. Kraft Foods, Inc.*, 285 F.3d 688, 691 (8th Cir. 2002) ("[plaintiff] may prove pretext and 'avoid summary judgment only if the evidence considered in its entirety (1) creates a fact issue as to whether the employer's proffered reasons are pretextual and (2) creates a reasonable inference that [race] was a determinative factor in the adverse employment decision.'") *quoting Rothmeier v. Investment Advisers, Inc.*, 85 F.3d 1328, 1336-37 (8th Cir. 1996); *Erickson v. Farmland Industries, Inc.*, 271 F.3d 718, 726 (8th Cir. 2001) (to avoid summary judgment plaintiff must create an issue of material fact as to

pretext and create a reasonable inference of discrimination); *Scroggins v. Univ. of Minn.*, 221 F.3d 1042, 1044 (8th Cir. 2000) (same); *Taylor v. QHG of Springdale, Inc.*, 218 F.3d 898, 900-01 (8th Cir. 2000) (same).

In the instant case, the Court of Appeals did not use a preponderance of the evidence standard in evaluating Petitioner's pretext evidence. Instead, the Court of Appeals followed the standard articulated by this Court in the 1986 summary judgment standard trilogy when it reviewed all of the evidence and determined that a reasonable jury could not find that age or gender played a role in her termination. *Wittenburg v. American Express Financial Advisors, Inc.*, 464 F.3d 831, 836, 842 (8th Cir. 2006). As this Court held in *Celotex Corp. v. Catrett*, a defendant is entitled to summary judgment where a plaintiff has failed "to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial.". 477 U.S. 317, 322 (1986). "Where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no 'genuine issue for trial.'" *Matsushita Electrical Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). The plaintiff must produce sufficient evidence to allow a reasonable jury to return a verdict in his favor. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). This standard, properly applied, allows the Court to fulfill the legal mandate regarding summary judgment procedure, not as a disfavored procedural shortcut, but rather "as an integral part of the Federal Rules as a whole, which are designed to secure the just, speedy, and inexpensive

determination of every action." *Celotex*, 477 U.S. at 327, citing Fed. R. Civ. P. 1.

In the instant case, the Court of Appeals reviewed Petitioner's evidence against the burden-shifting analysis of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973). *Wittenburg*, 464 F.3d at 837. The Court of Appeals, as did the district court, assumed without deciding that Petitioner established a prima facie case of age and gender discrimination. *Id.* The Court noted the parties' agreement that AEFA proffered a legitimate non-discriminatory reason for Petitioner's termination in the November 2003 RIF. "Accordingly, our task is to determine whether a genuine issue of material fact remains whether AEFA's non-discriminatory reason was pretextual." *Id.* The Court of Appeals, as did the district court, then reviewed the evidence Petitioner presented in support of her argument that her termination was a pretext for discrimination, rejecting it as insufficient to support a reasonable inference of discrimination. *Id.* at 837-842. In doing so, the Court of Appeals applied the summary judgment analysis standard adopted by this Court and did not hold Petitioner to an incorrect standard of proof.

II. THERE IS NO CONFLICT IN THE COURTS OF APPEALS ON THE ISSUE OF WHEN STRAY REMARKS CONSTITUTE EVIDENCE OF DISCRIMINATION.

Petitioner tried and failed to manufacture an inference of discrimination from remote statements

attributed to her former co-workers. In attempting to cast this fact-bound issue as one requiring of this Court's intervention, Petitioner contrives a split between the circuits on the analysis of alleged discriminatory remarks as submissible evidence of pretext. Petitioner argues that there is a split among the circuits with regard to whether or not the alleged discriminatory remarks must have some causal connection to the adverse action. To the contrary, a clear and growing consensus among the circuits has emerged that - consistent with this Court's teaching in *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000) -- a causal connection must exist. Thus, even the shallow division of authority Petitioner alleges is illusory.

In *Reeves v. Sanderson Plumbing Products, Inc.*, this Court analyzed a claim that discriminatory remarks created an inference of discrimination. In reviewing a motion for summary judgment as a matter of law, this Court found that the plaintiff had introduced sufficient evidence that his termination decision was motivated by age based animus based on statements made by the actual decision-maker behind his hiring that he "was so old [he] must have come over on the Mayflower" and that he "was too damn old to do [his] job." *Id.* at 151. The Court found these statements were not stray remarks because the person who made the statements was the plaintiff's supervisor who had direct influence in the decision to terminate the plaintiff and because of other evidence of the supervisor's disparate treatment of the plaintiff and his co-worker who was 24 years younger. Noting all of these factors, including the substance of the statements and the

fact that they were made by a decision-maker in temporal proximity to the plaintiff's termination, the Court determined that the evidence was sufficient to create a reasonable inference of age aminous.

None of these factors were present in the instant case. The statements alleged to demonstrate discriminatory bias were vague and ambiguous and made discriminatory only by the speculative interpretation applied by the Petitioner. The statements were not temporally or causally related to her termination in the RIF, and there was no additional evidence of disparate treatment or other discriminatory conduct that would have supported a reasonable inference of age or gender animus.

The Court of Appeals' statement that a plaintiff must establish "some causal relationship" to show "the significance of [decisionmakers'] non-contemporaneous statements, or statements made by persons other than the relevant decision-maker, to the resolution of the ultimate issue of intentional discrimination" is consistent with this Court's precedent and that of the other Courts of Appeals. *Wittenburg*, 464 F.3d at 837, *citing Hutson v. McDonnell Douglas Corp.*, 63 F.3d 771, 779 (8th Cir. 1995) (emphasis in original). In determining whether a statement creates an inference of discrimination, the Eighth Circuit considers factors such as (1) whether the statements were made by employees who took part in the decision or influenced the decision to terminate the plaintiff; (2) the time gap between when the statements were made and the date of termination; and (3) "whether the statement itself" is "an exhibition of

discriminatory animus" or merely an "opinion that such aminous might exist." *Id.*; *citing also, Frieze v. Boatmen's Bank of Belton*, 950 F.2d 538, 542 (8th Cir. 1991) (holding that comments from the president of the company did not create a reasonable inference of discrimination because the president's comments to the employee that he had "waited too long . . . to start [his] effort towards becoming president of a bank and [the employee] would never make it" were made four years before the employee was discharged and before the president was actually the president).

Contrary to Petitioner's argument, the Third and Sixth Circuits also require some causal connection between a discriminatory statement and the employment decision. The Third Circuit, in *Ryder v. Westinghouse Elec. Corp.*, 128 F.3d 128, 132 (3rd Cir. 1997), *cert. denied*, 522 U.S. 1116 (1998), held that if the stray remark was made by an individual outside the employer's decision-making process, it may "constitute admissible evidence of managerial atmosphere and a possible discriminatory intent" only if certain factors were present. *Id.* at 133, *citing Walden v. Georgia-Pacific Corp.*, 126 F.3d 506 (3d Cir. 1997). The *Ryder* Court cautioned about automatically assuming that any bigoted remark made by any corporate executive or other influential official should be deemed probative evidence of a discriminatory corporate culture. Rather, *Ryder* directed courts to weigh several factors in assessing the relevance of such remarks, including the declarant's position in the corporate hierarchy, the purpose and content of the statement, and the temporal connection between the statement and the challenged employment action. *Id.*

In *Pivirotto v. Innovative Sys., Inc.*, 191 F.3d 344 (3d Cir. 1999), the Third Circuit found that discriminatory statements allegedly made by the company chairman that referred to women as less dependable than men were merely stray remarks which are "rarely given great weight, particularly if they were made temporally remote from the date of decision." *Id.* at 359. Though the chairman had the "final word" in hiring and firing, the Court reasoned that the statement was not probative of discrimination because it was not made in the context of any employment decisions involving the plaintiff. In addition, the Court noted that the remark did not reflect a generally discriminatory attitude at the company. *Id.* See also, *Windfelder v. The May Dep't Stores Co.*, 2004 WL362292 (3d Cir. February 26, 2004) (in affirming district court's grant of summary judgment in favor of the defendant, the Third Circuit held that comments directed to the plaintiff made two years prior to his termination, by a non-decision-maker, were "stray remarks" and not evidence of discriminatory animus; *Cerutti v. BASF Corporation*, 349 F.3d 1055 (7th Cir. 2003) (same).

The Sixth Circuit, in *Tooson v. Roadway Express, Inc.*, 47 Fed. Appx. 370, 375 (6th Cir. 2002), found no error in the district court's jury instruction that, unless the plaintiff has shown that the remarks were made by an employment decision-maker, "you are not to consider any stray remarks, comments, or characterizations in your deliberations." The court held that in order to be admissible evidence of discriminatory intent "the jury is required to find that the statement was that of a decisionmaker." *Id.*

The Sixth Circuit has also considered temporal proximity a relevant factor in the determination of stray remarks. In *Shefferly v. Alliance Health Plan of Mich.*, 2004 U.S. App. LEXIS 6829 (6th Cir. April 5, 2004), where plaintiff was told to "flirt and drink" more than a year before the alleged adverse employment action, the Court found this comment "too far removed in time to be probative of disparate treatment." *Id.* at *12.

The only other circuit alleged to reflect this split, the Eleventh, has similarly required that the remarks be related to an employment practice, or be made by a decisionmaker before they are considered probative of discrimination. In *Equal Employment Opportunity Commission v. Alton Packaging Corp.*, 901 F.2d 920, 924 (11th Cir. 1990), the Eleventh Circuit found that racial slurs made by the man responsible for promotion decisions were not "stray remarks" because "[he] was a decision-maker, and he made the remark in reference to hiring." *See also*, *Rojas v. Florida*, 285 F.3d 1339 (11th Cir. 2002) (employer's isolated sexist remark regarding a woman other than the plaintiff was insufficient on its own to establish pretext); *Scott v. Suncoast Beverage Sales*, 295 F.3d 1223 (11th Cir. 2002) (isolated racist comment made by supervisor and directed at plaintiff is insufficient on its own to establish pretext).

The decisions of the Third, Sixth and Eleventh Circuit are consistent with those of the other circuits, including the Eighth Circuit in that all consider the content and context of the statement, the timing the statement and who made the

statement in order to determine whether it is probative of discrimination. *Dunsmuir v. May Department Stores Co.*, 120 Fed. Appx. 927, 930 (3d Cir. 2005) (statement by nondecision-maker nine months prior to alleged adverse action was a stray remark insufficient to support a claim of retaliatory discharge); *Fetterman v. Napco, Inc.*, 2005 WL 1652212 at *2 (3d Cir. Jul. 14, 2005) (finding that stray remarks did not demonstrate pretext, as one remark did not pertain to age and the second remark was uttered seven months after plaintiff's discharge and was not probative of whether discharge was because of age discrimination); *Rowan v. Lockheed Martin Energy Systems, Inc.*, 360 F.3d 544, 549 (6th Cir. 2004) (stray comment made on the golf course by managers seven years before termination did not constitute direct evidence of discrimination); *Hitt v. Harsco Corp.*, 356 F.3d 920, 925 (8th Cir. 2004) (while stray remarks regarding age may be relevant to establishing a prima facie case or pretext under some circumstances, such comments are not persuasive evidence of motive when the remarks are made by persons other than the decision-maker).

At most, Petitioner has identified a conflict *within* a circuit, but not between the circuits. *Cf. Abrams v. Lightolier, Inc.*, 50 F.3d 1204, 1214 (3d Cir. 1995) ("Discriminatory comments by non-decisionmakers, or statements temporally remote from the decision at issue may properly be used to build a circumstantial case of discrimination."), *Windfelder v. May Dep't Stores Co.*, 2004 WL 362292, at *3 (Comment made two years prior to plaintiff's termination "carries little weight" because it was made by a nondecisionmaker."); and *Foster v.*

Newcastle Area Sch. Dist., 2004 WL830878, at *3 (3d Cir. April 16, 2004) (School board members' remarks were "simply statements by nondecision-makers that are insufficient" to support a claim of discrimination.). But as this Court has noted, the proper solution for such intracircuit conflicts is en banc review and not certiorari. *Wisniewski v. U.S.*, 353 U.S. 901, 902 (1957) ("It is primarily the task of a Court of Appeals to reconcile its internal difficulties").

The Eighth Circuit applied this same analysis in analyzing and rejecting the alleged discriminatory remarks Petitioner asserted constituted probative evidence of age discrimination. *Wittenburg*, 464 F.3d at 837. The Court of Appeals determined that in addition to having no causal connection to Wittenburg's termination, Truscott's statement that the company was "not averse to hiring younger portfolio managers or analysts and growing them" did not evince a discriminatory policy or practice. Likewise, the Court of Appeals determined that there was no evidence that Forker's reference to maybe add a "junior person" in her notes made in connection with the 2002 talent assessment, had any causal connection to Wittenburg's termination or that it equated with a "younger person." Forker testified that "junior person" referred to band level, a company-specific designation of compensation (Appellant's Appendix on appeal to Eighth Circuit at A-256). Additionally, the Court rejected Petitioner's argument that Rivera's comment to another employee during an earlier RIF in which Petitioner was retained, was probative of discrimination in Petitioner's case because it was a non-

contemporaneous statement of a non-decision-maker.

Finally, the Court rejected Petitioner's argument that statements made by Mahowald created a reasonable inference of gender discrimination. The Court rejected Wittenburg's contention of discriminatory bias based on Mahowald's statement that he was hiring Brumley because he had been unemployed for ten months and that Mahowald "also talked about [Brumley's] family"; and Mahowald's statement after her termination that "your husband has a job, doesn't he" because they were too vague to suggest discriminatory bias. *Id.* at 841. Recognizing that on summary judgment the court must make all reasonable inferences in favor of the non-moving party, the Court determined that inferring gender bias from these statements was not reasonable.

Even if, however, Petitioner were not incorrect in her interpretation of the Court's analysis, this matter does not warrant this Court's review. Not every intracircuit difference in the articulation or application of a legal doctrine requires this Court's intervention. Here, it is a telling difference that none of the cases relied upon by the Plaintiff as proof of the supposed conflict actually state that such a conflict exists. That demonstrates the absence of a critical precondition to this Court's need to become involved – percolation of a recognized conflict, as judges debate whether to resolve the conflict by adjusting the standards themselves.

III. THE STANDARD USED BY THE COURT OF APPEALS IN EVALUATING PETITIONER'S EVIDENCE ON SUMMARY JUDGMENT IS NOT IN CONFLICT WITH THIS COURT OR WITH OTHER COURTS OF APPEALS.

Petitioner's argument that the lower court failed to review the "totality of the evidence" is an incorrect characterization of the Court's decision and an inadequate basis for granting the petition. What Petitioner characterizes as a failure to review all of the evidence and to view all inferences in her favor is nothing more than her disagreement with the Court's rejection of her evidence as failing to create an inference of discrimination. "A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." Rules of the Supreme Court, Rule 10.

Petitioner argues that the Court of Appeals failed to review all of the evidence which she claimed supported a finding of pretext when it determined that there was not sufficient evidence from which a reasonable jury could determine that her termination was discriminatory. However, a review of the Court's decision demonstrates that the Court reviewed all of the evidence Petitioner claims was ignored. *Wittenburg*, 464 F.3d at 836-842. Petitioner objects to the Court's unwillingness to accept her inaccurate mischaracterization of the evidence. Petitioner's argument is essentially that in viewing all reasonable inferences in her favor, the Court was required to accept her mischaracterization of the

evidence. This is not an accurate statement of the Court's role on summary judgment.

For example, the Court reviewed Petitioner's argument that the results of the EID redesign was itself indicative of age discrimination because AEFA "got rid" of the eight oldest analysts in the department and gave four of the five oldest analysts low G4 or L4 ratings in 2002, thereby setting them up for termination in the 2003 RIF. *Wittenburg*, 464 F.3d at 837. The Court reviewed the evidence presented by Petitioner and determined that it did not support her assertion. "Wittenburg, however, ignores evidence that several members of the protected class survived the RIF. Out of 31 analysts affected by the 2002 and 2003 RIFs, 17 were 40 years old or older. Of those 17 analysts, 6 were terminated, 4 resigned, and 7 survived the RIF, in comparison, of the 14 analysts in the non-protected class, 4 were terminated, 2 resigned, 2 were transferred to the hedge fund, and 6 survived the RIFs. Also, of the 20 analysts evaluated Steve Schroll, age 46, and Paul Stocking, age 41, both members of the protected class, ranked 1st and 2nd respectively, in the 2002 analyst rankings. In addition, the two analysts terminated with Wittenburg from the Technology Sector were both *younger* than she – Friedrichsen, age 41 and Lauber, age 36. Furthermore, Hollenhorst, who was the *same age* as Wittenburg in 2003 (age 51) was *not* terminated during the 2003 RIF." *Wittenburg*, 464 F.3d at 837-838 (emphasis in original).

The Court of Appeals similarly reviewed the evidence presented by Petitioner in support of her

assertion that AEFA's reliance on her 2002 G4/L3 rating to justify her termination was pretextual, and rejected Petitioner's argument because the evidence did not support her assertion. For example, Petitioner argued that Mahowald conducted the performance evaluation knowing there could be another RIF in the department in 2003 and that his performance rating would determine which analysts would be eliminated. However, the only evidence of record directly refuted this assertion since Mahowald's email to the EID after the June 2, 2002 RIF stated "[t]here is no second shoe to drop." *Id.* at 839. Similarly, Petitioner argued that discriminatory bias in the review was demonstrated by the fact that Mahowald did not present her with a written review of her rating. However, the undisputed record showed that none of the analysts received a written review from Mahowald in 2002. *Id.*

The Court of Appeals also rejected Petitioner's assertion that a high rating from Starmine based on the same performance data that AEFA used was indicative of discriminatory bias in Mahowald's review because the undisputed record established that AEFA never used Starmine for evaluating performance. In addition, Petitioner admitted that Mahowald did not have access to her 2002 Starmine rating when he gave her the rating. Moreover, the undisputed evidence of record demonstrated that the G4 rating was based on other factors in addition to the stock performance data evaluated by Starmine. *Id.*

In sum, the Court of Appeals did not fail to look at the totality of the evidence. The Court looked

at the evidence Petitioner asserted demonstrated evidence of discriminatory bias and rejected it as not reasonably tending to do so. Neither did the Court of Appeals view Petitioner's termination in isolation, as Petitioner states. The Court considered undisputed evidence that Petitioner's termination was part of an overall RIF in connection with the redesign of AEFA's EID. Several other analysts were terminated in the RIF, and in other RIFs in connection with the redesign. The selection of those terminated was based on AEFA's multiple incumbent process, which was conducted by human resources professionals and not, as Petitioner suggests, by Mahowald, Truscott or Rivera. The only part Mahowald played in the identification of Petitioner for termination in the third RIF was his G4 performance rating of her for 2002. While Petitioner argues that the rating was unfair, viewing the evidence as a whole with all reasonable inferences in her favor, she was unable to produce evidence that it was discriminatory.

Petitioner argues that the Court viewed each piece of evidence in isolation and then wrongly concluded as to each piece of evidence that it "alone" did not establish discrimination. Petitioner's argument is essentially that insufficient evidence became sufficient by virtue of quantity, even though its quality did not meet the required legal standard. The Court of Appeals correctly rejected Petitioner's quantity over quality argument. The court reviewed all of her evidence of pretext, and determined that none of it created a reasonable inference of discrimination.

IV. THE PETITION IS BASED ON THE INCORRECT ASSERTION THAT THE COURT OF APPEALS HELD THAT AS A MATTER OF LAW THERE COULD BE NO INFERENCE OF AGE DISCRIMINATION BASED ON A SIX-YEAR AGE DIFFERENCE BETWEEN A TERMINATED PLAINTIFF AND A PERSON IN THE PROTECTED CLASS WHO ASSUMED HER DUTIES.

Petitioner argues that review of this case is necessary to correct the Court of Appeals' determination that a six year age difference between Petitioner and one of the two individuals to whom her duties were distributed after the RIF created an inference of age discrimination. Petitioner's argument is based on the incorrect assertion that the Court of Appeals determined that as a matter of law there could be no inference of age discrimination from the fact that a terminated plaintiff's duties were assumed by someone in the protected class who was six years younger. The Court of Appeals did not adopt or apply any such bright line rule in this case. Instead, the Court of Appeals engaged in precisely the analysis urged by Petitioner, by reviewing the totality of the circumstances and determining that there was no inference of age discrimination created by the fact that after the RIF, Petitioner's duties were distributed to two people in the protected class who were two and six years younger than her, respectively. *See Wittenburg*, 464 F.3d at 840 (adopting fact-specific analysis). This determination is consistent with *O'Connor v. Consol. Coin Caterers*

Corp., 517 U.S. 308, 313 (1996) and the other Courts of Appeals, which determine the significance of the age disparity with reference to the circumstances of the particular case. See *e.g.*, *Grosjean v. First Energy Corp.*, 349 F.3d 332 (6th Cir. 2003) (surveying the Courts of Appeals on the analysis of "substantially younger" from *O'Connor*).

Petitioner argues that the Court of Appeals erred in determining that there was no reasonable inference of discrimination from the fact that after she was laid off in the RIF, two employees that were younger than her took over some of her duties. One of the employees was 49 and the other 45. In *O'Connor*, this Court stated that "the ADEA prohibits discrimination on the basis of age and not class membership" and therefore directed the courts to look at whether the replacement employee was "substantially younger" than the plaintiff. *O'Connor*, 517 U.S. at 313. The Court of Appeals held that it "[could] not rely on an arbitrary above 40/below 40 rule," *Wittenburg*, 464 F.3d at 840, *quoting Schiltz v. Burlington N.R.R.*, 115 F.3d 1407, 1413 (8th Cir. 1997). The Court reviewed the circumstances of the replacement of Petitioner, including that it involved a RIF and one of the replacement employees was only two years younger than Petitioner. *Id.* The Court of Appeals did not, as Petitioner suggests, establish a rule that a six year age disparity was insufficient to establish a reasonable inference of discrimination. Instead, the Court determined that in this case, based on the undisputed facts of record, which included that the replacement of Petitioner was after a RIF by two employees in the protected class, one of whom was only two years younger than

she, there was no reasonable inference of discrimination. This analysis and holding is consistent with this Court's precedent and with that of other circuits. *See Grosjean*, 349 F.3d at 335-340.

In *Grosjean*, the Sixth Circuit Court of Appeals rejected the plaintiff's argument that because two employees who took over his duties after a RIF were three and six years younger than him, there was a reasonable inference of discrimination. The Court in *Grosjean* rejected the plaintiff's argument because the replacement occurred in the context of a RIF, the replacement employees had been doing jobs same or similar to the plaintiff prior to the RIF, and the largest age disparity between the plaintiff and the two replacement employees was six years. *Id.* at 336. *Grosjean* did not, as the Petitioner asserts, create a bright line rule that six years was not enough to establish a reasonable inference of age discrimination. Instead, the Court held that "[i]n the absence of direct evidence that the employer considered age to be significant, an age difference of six years or less between an employee and a replacement employee is not significant." *Id.* Even if *Grosjean* could be read as creating a bright line rule, it is not appropriate to review that issue in this case when no such bright line rule was adopted by the Eighth Circuit Court of Appeals.